United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1250

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

B P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

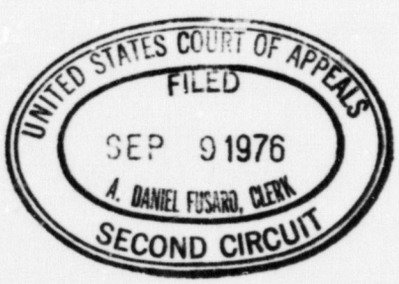
against

JOSEPH C. VISPI,

Defendant-Appellant.

APPEAL FROM ORDERS AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT



OHLIN, DAMON, MOREY, SAWYER & MOOT
RICHARD E. MOOT, Esq.
TERRENCE M. CONNORS, Esq.
of counsel
1800 Liberty Bank Building
Buffalo, New York 14202
Tel. No. (716) 856-5500
Attorneys for Appellant,
Joseph C. Vispi

TABLE OF CONTENTS

POINT I

NEITHER THE GOVERNMENT'S BRIEF NOR SUPPLEMENTAL APPENDIX SETS FORTH A FACTUAL OR LEGAL BASIS WHICH JUSTIFIES THE TWENTY-ONE MONTH DELAY IN THE TRIAL OF THIS ACTION.

The plain facts of this appeal cannot be disguised. The defendant was formally charged with failure to file his 1967-68 income tax returns on February 1, 1974. He was not tried on these charges until October 23, 1975, almost twenty-one months later. Unabashedly, the Government argues that despite this twenty-one month delay, they complied with the various "Speedy Trial" rules and provisions of the Constitution and a fortiori the defendant's constitutional rights have not been violated.

The twenty-one month delay is not violative of the six month rule, the Government argues, because the Government completed the clerical act of typing and filing a routine Notice of Readiness form, on August 14, 1974, some six months and fourteen days after the filing of the charges. (A-16)

Once this ministerial, clerical act has been accomplished, the Government argues, "... no reason for delay in bringing the case to trial was proffered by the Government. No reason was necessary because the Government was ready and able to proceed to trial and so indicated by its notice." (Government's Brief, p.10).

In fact, the Government was not ready for trial on August 14, 1974. Witnesses had not been subpoenaed (A-281, et seq.) nor apparently the principal witnesses contacted and interviewed until much later (A-139, A-281, et seq.). The Government did not seek a trial date or take any further action to bring the case on for trial, until April 30, 1975, a full fifteen months after the charges had been filed and more than nine months after the filing of the purported "Notice of Readiness". (A-19)

Notwithstanding this continuous delay, the prosecution now attempts to shift the blame to the Court by stating "(t)he Government saw no need to justify to the defendant delays caused by the Court. The overcrowded condition of the Courts is public knowledge..." (Government's Brief, p.10)

Whatever the "public knowledge" may be, the Government can hardly claim that Judge Burke's court was daily engaged in trial matters which prevented the two day trial, at any time, during the twenty-one month period following the filing of the Information or the fourteen and one half month period following the filing of the purported Notice of Readiness.

The fact of the matter is obvious. The case was not tried until twenty-one months after the Information was filed because the prosecution did not get around to it.

All that the Government did to meet its obligation under the six month rule was to type and file a form, i.e. the purported Notice of Readiness. Even this Notice was not filed until eight days after defense counsel charged the delay to the Government and fourteen days after the six month period expired. Thereafter, an additional fourteen and one half month delay ensued, despite the fact that eight days after his receipt of the purported Notice of Readiness, counsel for the defendant requested an immediate trial. (A-17) The Government argues that no reason need be proffered for the ensuing fifteen month delay, nor is there any need for the prosecution "to justify to the defendant" or apparently this Court such further delay because of "public knowledge" of overcrowded courts and the reason for the delay.

There is nothing in the record that supports this argument. There is nothing in the pretrial motions, the trial itself nor in the record that supports the position of the Government. We now have only the naked and implausible assertion that a two day non jury trial could not be had in Judge Burke's court at anytime for a fifteen month period following the typing and filing of the purported Notice of Readiness.

If such a claim were not fiction, but fact, it could have been documented. Neither the six month rule nor defendant's constitutional rights can be put aside by such a fiction. Neither may be so easily bent or circumvented. More than the few minutes necessary

to type and file a one page Notice of Readiness form is required by the prosecution to discharge their obligation to afford the defendant the speedy trial to which he is entitled under the appropriate rules and the Constitution.

The Government concedes that, "Mr. Vispi properly asserted his right to a speedy trial." (Government's Brief, p.10) There is no claim by the Government that the defendant improperly delayed the trial of the case. In fact, the supplemental appendix filed by the Government indicates quite the reverse. From the very beginning, the defendant did everything possible to expedite his trial.

Defendant was not notified of the scheduled arraignment until March 26, 1974. Within three working days, April 2nd, defense counsel mailed to the United States Attorney, the customary discovery motion, prior to the scheduled arraignment. (Supplemental Appendix, p.17) The actual filing of the motion was delayed until the matter could be heard by Judge Burke, April 22, 1974, but for twenty days prior to the hearing date counsel for the Government had a complete set of defendant's motion papers so that the Government could determine the information and documents to be furnished to the defendant prior to the arraignment.

The fact that this attempt of the defendant to expedite the discovery and the trial of the case failed clearly is not

chargeable, in any proportion, to the defendant. Had the prosecution taken advantage of this twenty day period prior to the formal filing of the motion, the information and documents to be furnished to the defendant could have been resolved at the arraignment with no delay.

Again the supplemental appendix filed by the Government does not indicate what, if any action, counsel for the Government took in connection with these papers which defense counsel had furnished twenty days in advance of the formal filing. The conclusion is inescapable. The Government did nothing. Upon the return date, the Government was not prepared to furnish the properly requested information or documents; the matter dragged; confusion developed between the prosecution and the district judge as to the date of final submission and ultimately the matter was not resolved until defense counsel, not the Government, brought the matter to the district judge's attention (Supplemental Appendix, p.20).

Such a record of neglect, delay, inattention to detail and confusion on the part of the prosecution and the district judge forms no basis for charging any portion of the six month period to the defendant. The decision of this appeal requires no sweeping edict. It requires no more than a fair and sensible interpretation and application of the six month rule.

Defendant did nothing to improperly delay the trial of the case. On the contrary, defense counsel took extraordinary steps to expedite the matter, all to no avail, because the Government's efforts to meet their burden were limited to the clerical and ministerial act of filing a Notice of Readiness and nothing more. A twenty-one month delay may not be reduced to six months by such a technicality. The purpose and the intent of the six month rule goes beyond simply adding another piece of paper or form to the file of the Government and that of the Court while delay in the actual progress of the prosecution continues unabated.

Dated: September 8, 1976

Respectfully submitted,

OHLIN, DAMON, MOREY, SAWYER & MOOT
Attorneys for Appellant,
Joseph C. Vispi
Office and Post Office Address
1800 Liberty Bank Building
Buffalo, New York 14202

Richard E. Moot, Esq.
Terrence M. Connors, Esq., of counsel

CERTIFICATE OF SERVICE

I, certify that ten (10) copies of this reply brief of the defendant, Joseph C. Vispi, were filed with the Court by mailing the same to Hon. A. Daniel Fusaro, Clerk, U.S. Court of Appeals, Second Circuit, Room 1702, U.S. Courthouse, Foley Square, New York, New York 10007 and that an additional three (3) copies were served upon the Government by mailing the same to Eugene Welch, Assistant U. S. Attorney, New Federal Building, 100 State Street, Rochester, New York 14614 on the 8th day of September, 1976.

Dated: September 8, 1976

Richard E. Moot
Counsel for Defendant,
Joseph C. Vispi
OHLIN, DAMON, MOREY, SAWYER & MOOT
1800 Liberty Bank Building
Buffalo, New York 14202